

***Determining Victims and Harms for
Restitution in Federal Criminal Cases***

*Catharine M. Goodwin, Assistant General Counsel
Administrative Office, U.S. Courts
March, 2000*

Training Materials - Table of Contents

A. History of Federal Restitution Law	3
B. Steps in Determining Restitution	4
<i>Step 1: Identify the offense of conviction</i>	5-6
<i>Step 2: Identify victims</i>	7
Case law: Identifying victims	8
<i>Step 3: Identify victims' harms caused by the offense</i>	9
Case law: Causation	9
<i>Step 4: Determine which harms (and/or costs) are compensable as restitution</i>	10
Case law: Compensable harms/costs	11
Restitution Compared to Relevant Conduct	12
<i>Step 5: Determine if plea agreement broadens restitution</i>	13
C. "Community Restitution"	14
D. Sequence for Imposition and Collection of Financial Penalties	15
E. Manner of Payment	16 - 17
F. Reference Documents on Restitution	18

A. History of Federal Restitution Law

- 1925 Federal Probation Act (FPA)** - Restitution imposable only as condition of supervision
- 1982 Victim Witness Protection Act (VWPA)** - 18 U.S.C. §§ 3579, 3580
Restitution as a separate component of sentence
Discretionary restitution - court must balance harm with defendant's ability to pay
- 1984 Sentencing Reform Act** - Recodified VWPA at §§ 3663 and 3664; reaffirmed restitution as one of several, separate components of a sentence.
- 1990 *Hughey v. U.S.*** - S. Ct. allows restitution only for harm caused by offense of conviction

Post-Hughey Amendments to VWPA:

- 1) restitution for scheme, pattern, conspiracy - if element of offense (§ 3663(a))
- 2) parties can agree to restitution to any extent, in any case (§ 3663(a)(3))
- 3) parties can agree to restitution to other than victims of offense (§ 3663(a)(1)(A))

- 1992 Mandatory restitution for Child Support Recovery Act (CSRA)** - 18 U.S.C. § 228
- 1994 Mandatory restitution for certain title 18 offenses, such as violence against women, exploitation of children, and telemarketing:**
§ 2248 (for §§ 2241-2245, sexual abuse)
§ 2259 (for §§ 2251-2258, sexual exploitation of children)
§ 2264 (for §§ 2261-2262, domestic violence)
§ 2327 (for §§ 1028-1029 and §§ 1341-1345, telemarketing)

Amendment to VWPA:

Restitution for victims' lost income, transportation, child care, and other expenses related to participation in investigation and prosecution of case - § 3663(b)(4).

- 1996 Mandatory Victims Restitution Act (MVRA)** - amended §§ 3663 and 3664; amended debt collection statutes (§ 3611 et. seq. and § 3571 et. seq.); created § 3664A (mandatory restitution for most non-drug federal offenses); victims "directly and proximately" harmed by the offense; "full amount of each victim's losses" at § 3664(f)(2); stronger imposition and enforcement procedures.
- 1998 Deadbeat Parents Act of 1998** - changes to CSRA (18 U.S.C. § 228), clarifying mandatory nature of restitution for past due support obligations.

D. Steps in Determining Victims and Harms for Restitution in Federal Criminal Cases

Step One:

Identify the Offense of Conviction (in order to determine:)

- a) whether restitution is mandatory or discretionary**
- b) whether restitution can be imposed as separate sentence or only as a condition of supervision**
- c) what the scope of the offense is, for steps 2 and 3.**

Step Two:

Identify the Victims of the Offense of Conviction.

Step Three:

Identify Victims' Harms Caused by the Offense of Conviction.

Step Four:

Determine Which Harms (and/or costs) are Statutorily Compensable as Restitution.

Step Five:

Determine if the Plea Agreement Broadens Restitution.

Step One: Identify the Offense of Conviction

Three reasons:

- A) Determine whether restitution is mandatory or discretionary;**
- B) Determine whether restitution is authorized as a separate sentence or only as a condition of supervision;**
- C) Determine the scope of the offense of conviction, for steps 2 and 3.**

A. Determine Whether Restitution is Mandatory or Discretionary for the Offense

I. Mandatory Restitution

Court “shall” impose restitution the full amount of harm to identifiable victims, without consideration of defendant's ability to pay, for:

A. Offenses listed in § 3663A(c)

Crimes of violence (as defined in 18 U.S.C. § 16)

Tampering with consumer products (18 U.S.C. § 1365) and

All property offenses under title 18.

B. Exception (for title 18 property offenses, only): If number of identifiable victims so large that restitution is impracticable, or complex factual issues would complicate or prolong sentencing and outweigh need to impose restitution (§ 3663A(c)(3))

C. Specific title 18 provisions:

Sexual abuse (§§ 2241-2245; restitution at § 2248)

Sexual exploitation of children (§§ 2251-2258; restitution at § 2259)

Domestic violence (§§ 2261-2262; restitution at § 2264)

Telemarketing fraud (§§ 1028-1029 and §§ 1341-1345; restitution at § 2327)

Child Support Recovery Act (§ 228)

D. Statement of Reasons requires explanation if full restitution is Not imposed.

II. Discretionary Restitution

Court must balance harm to the identifiable victims caused by the offense with the defendant's financial resources (§ 3663(a)(1)(B)(i)), for:

A. Offenses listed in § 3663(a)(1)(A) (if not covered by § 3663A):

All other title 18 offenses;

Drug offenses with or without identifiable victims; and

Air piracy (title 49)

B. Any other offense - but only as a condition of supervision -

§§ 3563(b)(2) or 3583(d). Must otherwise conform to criteria in §§ 3663, 3664.

III. Restitution Under the Sentencing Guidelines

Court “shall” impose restitution for the full amount of the victim's loss, if authorized by statute (§5E1.1(a)(1)); Court “shall” impose probation or supervised release with condition of restitution for

the full amount of the victim's loss for any other offense with an identifiable victim.(§5E1.1(a)(2)).

B. Determine Whether Restitution is Authorized as a Separate Sentence or Only as a Condition of Supervision

1. **Restitution and fine are each separate components of the sentence, not part of the supervision component (as prior to 1982 under the FPA)**
Restitution is “in addition” to rest of sentence (§ 3663(a)(1)(A))
Restitution is a final sentence (§ 3572(c))
Defendant is “sentenced” to pay a fine (§ 3571(a))
2. **Restitution automatically becomes condition of probation (§ 3563(a))**
3. **Restitution survives supervision in most circuits, pre-MVRA** (See, e.g., U.S. v. Rostoff, 164 F.3d 63 (1st Cir. 1999). Three circuits imply that the 5-year limits in (repealed) § 3663(f) limit the obligation of restitution (see, U.S. v. Diamond, 969 F.2d 961, 969 (10th Cir. 1992); U.S. v. Joseph, 914 F.2d 780, 786 (6th Cir. 1990); U.S. v. Bruchey, 810 F.2d 456, 459-460 (4th Cir. 1987)). [Note: It is reasonable to interpret these cases as addressing the extent of the sentencing court’s authority, not the life of the obligation.
4. **Restitution survives supervision in all circuits, post-MVRA.** The MVRA repealed § 3663(f), and added provisions specifying that restitution is collectible by the government for 20 years after the defendant’s imprisonment (see §3664(m)(1)(A), and § 3613)).
5. **For any offense not listed in § 3663 or § 3663A, restitution may be imposed as a condition of supervision.**
 1. It expires when the supervision term ends.
 2. Still subject to same criteria of victims and harms as restitution under §§ 3663, 3664.
 3. It is possible court may be able to increase amount imposed, as a change of conditions, pursuant to Rule 32.1 F.R.Cr.P.

C. Determine the Scope of the Offense of Conviction for Applying Steps 2 and 3

Step Two: Identify Victims of the Offense of Conviction

Under Federal Restitution Statutes: Restitution Victims Must be Victims Harmed by Conduct of the Offense of Conviction

Statutory definitions of restitution victims:

(mandatory or discretionary restitution, generally):

“For purposes of this section, the term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered...” § 3663A(a)(2) and § 3663(a)(2).

(mandatory or discretionary restitution involving scheme, etc.):

“...including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, a victim is a person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.”
§ 3663A(a)(2) and § 3663(a)(2).

(specific title 18 offenses):

“...losses suffered by the victim as a proximate result of the offense.” Title 18 special restitution statutes (§§ 2248, 2259, 2264, and 2327).

Note: There is no statutory equivalent of §1B1.3, which expands the sentencing guidelines’ definition of “offense of conviction” for guideline sentencing purposes to include acts in preparation, avoidance, or acts within the same course of conduct or common scheme or plan. Therefore, “offense” for restitution purposes is not co-extensive with “offense” for guideline sentencing purposes.

Case Law on Identifying Victims

Courts Generally Define Scope of Offense Narrowly for Identifying Victims

Offense: Possession of stolen credit cards (18 U.S.C. § 1029(a)(3)): Court *cannot* award restitution to victims of the use of the cards: U.S. v. Hayes, 32 F.3d 171 (5th Cir. 1994); U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996); U.S. v. Cobbs, 967 F.2d 1555 (11th Cir. 1992); U.S. v. Mancillas, 172 F.3d 341 (5th Cir. 1999) (post-MVRA, reaffirming Hayes and Jimenez).

Offense: Use of stolen credit cards (18 U.S.C. § 1029(a)(1)): Court *can* award restitution to victims of the use of the cards; but *cannot* award restitution to victims of theft of the cards: U.S. v. Blake, 81 F.3d 498 (4th Cir. 1996); explained in U.S. v. Sadler (unpub.), 1998 WL 613821 (4th Cir.).

Note: Courts vary on how to apply conspiracy/scheme/pattern provision:

Compare U.S. v. Blake, 81 F.3d 498 (4th Cir. 1996) (restitution for scheme only when element of the offense), *with* U.S. v. Jackson, 155 F.3d 942 (8th Cir. 1998); U.S. v. Manzer, 69 F.3d 222, 230 (8th Cir. 1995); U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir.), *cert denied*, 115 S.Ct. 641 (1994) (determine scheme by looking to scope of facts at trial and in indictment); see also, U.S. v. Moore, 127 F.3d 635 (7th Cir. 1997) allowing restitution to “use” victims for possession offense (using plain error standard).

Post-MVRA: Identification of Numerous Victims: U.S. v. Grimes, 173 F.3d 634 (7th Cir. 1999), court should identify as many victims as possible and utilize the 90-day continuance for that purpose, if needed.

Offense: Felon-in-possession of a firearm (18 U.S.C. § 922(g)): Court *cannot* award restitution to individual shot by the defendant with the gun: U.S. v. McArthur, 108 F.3d 1350 (11th Cir. 1997) (defendant acquitted of 924(c) charge). *But cf.*, for guideline calculations, shooting victim can be vulnerable victim of relevant conduct for felon in possession offense: U.S. v. Kuban, 94 F.3d 971 (5th Cir. 1996).

Recent case: robbery was “integral part of the offense” of 924(c): U.S. v. Smith, 182 F.3d 733 (10th Cir. 1999). Offense was 924(c), underlying crime was robbery of a credit union. Restitution for injury and loss to credit union in robbery was upheld: use of the gun was “integral part of the offense” of 924(c).

Step Three: Identify Victims' Harms Caused by the Offense of Conviction

Statutory terms on causation of restitution harms:

- [the victim is] “*directly and proximately*” harmed (§§ 3663A, 3663)
- [the victim is] harmed as a “*proximate result* of the offense,” and “full amount of victim’s losses” (special restitution statutes in title 18)
- § 3664(f)(1) court shall impose restitution for “full amount of each ~~victim~~”s

Case Law on Causation

Must be non-routine and caused by the offense. U.S. v. Menza, 137 F.3d 533 (7th Cir. 1998).

Restitution to government for chemical disposal and to landlord for apartment cleaning apartment after defendant’s meth lab exploded, vacated: restitution proper only for non-routine costs caused by offense. Similarly, no restitution to government for “**buy money**” because it is routine cost of prosecuting case. See, e.g., U.S. v. Cottman, 142 F.3d 160 (3d Cir. 1998).

Reasonable estimate appropriate for restitution. U.S. v. Sapoznik, 161 F.3d 117 (7th Cir.

1998). Restitution upheld when computed on one of four-years’ salary of corrupt police chief convicted of bribery; restitution represented reasonably computed portion of chief’s services that were illegitimate.

May include related intervening causes. U.S. v. Meksian, 170 F.3d 1260 (9th Cir. 1999). Harm from intervening causes may be included in harm caused by the offense If the intervening cause is directly related to the offense of conviction (see discussion of case facts compared to and harmonized with three previous cases’ facts all involving intervening causes of harm). Here, harm from bad environmental impact study was not caused by defendant’s false statements to obtain a loan for the property from the SBA.

Special restitution statute terminology, and analogy to witness’ expense provision. U.S. v.

Hayes, 135 F.3d 133 (2d Cir. 1998). Restitution upheld for victim’s legal costs incurred prior to defendant’s interstate travel to violate protection order. (“Full amount of losses” under special restitution statute; also, restitution not restricted to harms incurred during offense, because restitution is allowed for victims’ participation in investigation and prosecution of the case).

Step Four: Determine Which Harms (and/or Costs) Are Statutorily Compensable as Restitution

I. Harms authorized for Restitution by 18 U.S.C. §§ 3663A(b) or 3663(b)

A. Which *harms* to the victims caused by the offense are statutorily compensable as restitution?

In offense resulting in damage to, loss, or destruction of victim's property --

Return of the property to the victim or designee or, if not possible,

Pay greater of value of property on date of damage, loss, or destruction, or on date of sentencing - less the value (as of the date the property is returned). §§ 3663A(b)(1); 3663(b)(1).

In offense resulting in bodily injury to a victim --

Pay cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including non-medical care and treatment recognized by the law of the place of treatment; and necessary physical and occupational therapy and rehabilitation; and income lost by the victim as a result of the offense. §§ 3663A(b)(2); 3663(b)(2).

In offense resulting in bodily injury and death of a victim --

Pay cost of necessary funeral and related services. §§ 3663A(b)(3); 3663(b)(3).

In each restitution order, the court shall order restitution for the full amount of each victim's losses (§ 3664(f)(1))

B. What *costs* to the victim are compensable as restitution?

In any case --

Pay victim for lost income, necessary child care, transportation, and other expenses related to participation in the investigation and prosecution of the offense or attendance at proceedings related to the offense. § 3663A(b)(4); 3663(b)(4).

II. Harms/Costs Authorized for Restitution by Special Restitution

Statutes:

The defendant shall pay the "full amount of the victim's losses" (§§2327, 2248, 2259, and 2264) which includes:

"all losses suffered by the victim as a proximate result of the offense."

(18 U.S.C. §§ 2327(2),(3), telemarketing); or

"any costs incurred by the victim for --

(A) *medical services, relating to physical, psychiatric, or psychological care;*

(B) *physical and occupational therapy or rehabilitation;*

(C) *necessary transportation, temporary housing, and child care expenses;*

(D) *lost income; (E) attorneys' fees, as well as other costs incurred; and*

(F) *any other losses suffered by the victim as a proximate result of the offense"*

(18 U.S.C. §§ 2248(3), 2259(3), and 2264(3), sexual abuse of a minor, sexual exploitation of children; and domestic violence).

Case Law on Compensable Harms/Costs: Must be Tied to Statutory Language

“Lost wages.” U.S. v. Jacobs, 167 F.3d 792 (3d Cir. 1999). Restitution upheld for annual leave used by victim, as “lost wages.”

Use of special restitution statute language; psychiatric care. U.S. v. Crandon, 173 F.3d 122 (3d Cir. 1999). Restitution upheld under § 2259 (sexual abuse of a child) for “full amount” of victim’s losses “proximately resulting” from the offense, including in-patient psychiatric care of 14 year old victim of defendant convicted of child pornography, who found victim on the internet.

Combination of statutory provisions. U.S. v. Malpeso, 126 F.3d 92 (2d Cir. 1997). Restitution upheld for FBI’s costs in relocating victim, based on combination of restitution for victim’s costs in participating in case and restitution to third parties who compensate victims for their harms (or costs).

Replacement value. U.S. v. Shugart, 176 F.3d 1373 (11th Cir. 1999). Replacement value was appropriate for lost property that is unique (here, a century-old church was destroyed by arson). This value better provides a fair equivalent to property lost. Replacement cost used modern construction cost, on same site, with same design. Actual cash (market) value at time of offense is appropriate for fungible items.

Future harms. U.S. v. Laney, 189 F.3d 954 (9th Cir. 1999). Restitution upheld for future mental health counseling for victim of sexual exploitation of child, because “ascertained” at sentencing with reasonable certainty; also, § 3664(d)(5), future discovery of losses, indicates intent to reach post-sentencing harms.

Tie harm to authorizing statutory language. For example, restitution upheld for cost of victim’s air fare to visit her family as “nonmedical care and treatment” for the victim’s trauma resulting from assault with intent to rape, in U.S. v. Keith, 754 F.2d 1388, 1393 (9th Cir.), cert denied, 474 U.S. 829 (1985). But: no statutory language cited to support restitution for psychological counseling for IRS employees in buildings bombed by defendant, without bodily injury, in U.S. v. Hicks, 997 F.2d 594, 601 (9th Cir. 1993).

Restitution Compared to Relevant Conduct

I. *The Offense of Conviction for Identifying Restitution Victims is Often Narrower Than the Relevant Conduct for the Offense*

Purpose of Relevant Conduct is to account for *culpability* of defendant and *harm or potential harm* from the offense. Relevant Conduct includes:

- acts in preparation of the offense
- acts in avoidance of detection of the offense
- acts in same course of conduct or common scheme or plan as offense.
- includes intended or attempted harms
- includes gain
- includes property that is recovered or returned

Purpose of restitution is to *restore the victim* to his or her pre-offense condition

Restitution includes:

- actual, unrecovered loss to victims (and certain costs)
- limited to offense of conviction (except where scheme, pattern, or conspiracy is an element of the offense of conviction).

II *Harms (and Costs) That are Compensable as Restitution Are Sometimes Broader Than Harms Computed in Relevant Conduct*

If victim suffers physical injury, restitution is authorized for psychological counseling, medical physical therapy or treatment, and funeral expenses if death resulted (18 U.S.C. § 3663(b) and § 3663A(b)).

“In any case,” transportation, child care, and other expenses involved in victims’ participation in investigation and prosecution of case (18 U.S.C. §§ 3663(b) and 3663A(b)).

Can sometimes be increased after sentencing (e.g., discovery of new losses pursuant to 18 U.S.C. § 3664(d)(5)).

Some special restitution statutes allow compensation for “all harms” and some specify a broader list of compensable harms than those in the VWPA, e.g. psychological treatment (18 U.S.C. §§ 2248, 2259, 2264, 2327)

Key: Restitution award must be articulated as tied to, or pursuant to, some statutory language authorizing the award.

Step Five: Determine if the Plea Agreement Broadens Restitution

I. Statutory provisions that allow broader restitution to be imposed:

If the parties agree, pursuant to a plea agreement, the court can order,

- a) Restitution in **any** criminal case **to the extent** agreed to by the parties in the plea agreement (§ 3663(a)(3));
- b) Restitution to persons **other than the victim of the offense** (§§ 3663A(a)(3) and 3663(a)(1)(A)); and
- c) **Mandatory restitution for non-qualifying offense**, if the parties agree that the plea agreement resulted from a qualifying offense (§ 3663A(c)(2)).

II. Application of above provisions:

General “agreements” or “understandings” are ineffective.

For example, provisions stating that -

the defendant knows the court can impose, restitution, or
the defendant knows the government will ask for restitution, or
the defendant “agrees to pay full restitution” for the offense,

are usually meaningless, and do not authorize the court to impose any more restitution than would otherwise be authorized for the offense of conviction.

See, e.g., U.S. v. Phillips, 174 F.3d 1074 (9th Cir. 1999).

- ▶ **Agreement must be a specific, binding agreement between the parties.**
- ▶ **Is probably separate sentence if imposed pursuant to plea provisions in restitution statutes, even if would not be otherwise**

III. Statutory directive to the government:

The MVRA added a commentary note to 18 U.S.C. § 3551 providing that the Attorney General shall ensure that, *“in all plea agreements . . . consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded.”*

C. “Community Restitution”

18 U.S.C. § 3663(c) and U.S.S.G. §5E1.1(d)

- ▶ Applies only to certain Title 21 offenses (does not include § 846) - § 3663(c)(1)
- ▶ Applies only if there is no identifiable victim - § 3663(c)(2)(A)
- ▶ Effective for offenses on or after November 1, 1997 - § 3663(c)(2)(A)
- ▶ May not exceed the fine imposed - § 3663(c)(2)(B)
- ▶ Penalty assessment and fine take precedence - § 3663(c)(5)
- ▶ May not interfere with forfeiture - § 3663(c)(4)
- ▶ Statute: the court “may” order community restitution - § 3663(c)(1)

Guideline: the court “shall” order community restitution - §5E1.1(d)

[But: It is a “departure” to not impose only where defendant has some additional ability to pay, after special assessments, other restitution (if any), and the minimum of the fine range is imposed - because fine takes precedence over this kind of “restitution.”]

- ▶ Clerk receives and distributes payments:
 - 65% to state crime victim agencies;
 - 35% to state substance abuse block grant - § 3663(c)(3)(A) & (B)

D. Sequence for Imposition/Collection of Financial Payments

I. Order of Imposition at Sentencing

Special assessments (for all offenses, pursuant to § 3013)

Restitution (If discretionary, to extent of defendant's ability to pay):

- a) private victims (non-United States victims) + interest
- b) United States as a victim + interest
- c) providers of compensation to private victims + interest

Fine - to extent of defendant's ability to pay

“Community restitution”:

For certain offenses, pursuant to § 3663(c)

Discretionary: to extent of defendant's ability to pay, if above imposed

Other penalties, costs, and interest

II. Order of Collection

Same as above

Options for court when defendant is in default of payment listed at § 3613A

III. Statutory Basis for Above Sequences:

§ 3612(c): general order of payments is: penalty assessment, restitution to all victims, all other fines, penalties, costs

§ 3612(i): payments for fine and restitution shall be applied in the following order: (1) to principal; (2) to costs; (3) to interest; and (4) to penalties.

§ 3663(c)(5): “notwithstanding § 3612(c),” a penalty assessment or a fine takes precedence over “community restitution”

§ 3663(c)(2)(B): “community restitution” cannot exceed “the amount of the fine ordered for the offense charged in the case”

§ 3664(i): restitution is paid to all other victims before paid to government as victim

§ 3664(j)(1): restitution paid to victims before paid to a provider of compensation

E. Manner of Imposition of Restitution¹

The full amount of restitution must be imposed for mandatory restitution cases, while the amount imposed must be adjusted for the defendant's ability to pay in discretionary restitution cases. How the court orders payment, of either kind of restitution, is the "manner of imposition."

I. Full or Partial Lump Sum Payment at Sentencing or Date Certain. The preferred method of imposition is, where possible, to require the defendant to pay all or part of the monetary penalty at sentencing or by a date certain soon thereafter. This saves difficult collection efforts later, when the information on the defendant's financial resources is not as current, and assets have often been dissipated or transferred. Where this is not possible, or where only partial payment is possible, the remainder should be imposed "due immediately," with a payment schedule perhaps set for supervision.

II. "Due Immediately." Any remaining amount not paid at sentencing or a date certain soon thereafter should be imposed "due immediately" in order for the Bureau of Prisons to be able to collect against the monetary penalty during the defendant's incarceration. The court may or may not also set a payment schedule for the period of supervision. If set, it should be amended, if necessary, when the defendant is released to supervision, or changed at any time, due to a change in the defendant's financial circumstances, pursuant to § 3664(f)(2).

Where possible, the AO and the DOJ have recommended that financial penalties be imposed in full, "due immediately," with no schedule set.² Some courts have recommended this approach as well.³ This approach avoids the impractical task of setting payment schedules far in advance of supervision, it avoids the need for the court to change the schedule to adjust to changing circumstances, and it allows the Bureau of Prisons (BOP) to collect during incarceration toward the pending amount "due." The Fourth Circuit recently upheld a "due immediately" imposition, that also set a payment schedule for supervision, in U.S. v. Dawkins, 202 F.3d 711 (4th Cir. 2000).

III. Payment Schedules. Three circuits do not currently allow imposition in full *unless* the court finds the defendant actually has the ability to pay the full amount immediately. The

E. Manner of Imposition of Restitution (continued)

¹For more thorough discussion of this topic, see Furgeson, Goodwin, and Zucker, "The Perplexing Problem with Criminal Monetary Penalties in Federal Courts," Review of Litigation, University of Texas School of Law, Spring 2000.

²See, e.g., "Looking at the Law," Adair, *Federal Probation*, June 1994. Naturally, if probation is imposed, it may be realistic and practical to also set a payment schedule at sentencing, if the court has sufficient information to do so.

³See, e.g., U.S. v. Ahmad, 2 F.3d 245, 248-9 (7th Cir. 1993) and U.S. v. Trigg, 119 F.3d 493 (7th Cir. 1997).

Second Circuit did so in U.S. v. Mortimer, 52 F.3d 429, 436 (2d Cir. 1995) (Mortimer I),⁴ and the Fifth Circuit did so in U.S. v. Myers, 198 F.3d 160 (5th Cir. 1999). (The Second Circuit has in addition suggested that a schedule be set for the period of imprisonment to allow some collection during that time, in U.S. v. Kinlock, 174 F.3d 297 (2d Cir. 1999).) The Third Circuit also now requires payment schedules to be set at sentencing - in mandatory restitution cases - because it interprets an MVRA provision (§ 3664(f)(2))⁵ to require a payment schedule to be set in all cases. U.S. v. Coates, 178 F.3d 681 (3rd Cir. 1999).

A more practical approach was recently taken by the Eighth Circuit in two cases applying the same provision (§ 3664(f)(2)). If a schedule is set it must be a realistic one (U.S. v. Rea, 169 F.3d 1111 (8th Cir. 1999), and where no schedule is set, it is harmless error because the defendant does not suffer prejudice from such an order until on supervision, at which time he can ask the court to modify the manner of imposition for changed circumstances, pursuant to § 3664(k) (U.S. v. Gray, 175 F.3d 617 (8th Cir. 1999)).

IV. “Delegation” of Payment Schedule. *To Probation Officers.* The Ninth and Eleventh circuits allow courts, after determining the amount of restitution to impose, to order that the defendant pay according to a schedule to be set by the probation officer. US v. Barany, 884 F.2d 1255, 1260 (9th Cir. 1989), *cert. denied*, 493 U.S. 1034; US v. Fuentes, 107 F.3d 1515, 1528-9, n. 25 (11th Cir. 1997). However, most other circuits prohibit such an order as an improper delegation of judicial authority to the probation officer. *See, e.g.,* US v. Porter, 41 F.3d 68, 71 (2d Cir. 1994); Ahmad, *supra* at 248-9; *These cases should not, however, affect the practicality of probation officers using informal collection schedules (“plans”) to monitor payment during supervision.*

To BOP. The Second and Fourth circuits prohibit the court ordering payment according to the BOP’s IFRP, as an improper judicial delegation. US v. Mortimer, 94 F.3d 89 (2d Cir. 1996) (Mortimer II); US v. Miller, 77 F.3d 71 (4th Cir. 1996). As noted above, the Second Circuit, in Kinlock, *supra*, suggested that the court use the BOP’s IFRP guidelines in determining what (minimum amount can be paid by the inmate. However, there are practical problems with this approach: the IFRP is voluntary; there are eligibility criteria for participation; it is impossible to predict the earning level of an inmate in advance due to the numerous earning levels possible; the Bureau cannot collect evenly across inmates; and the minimal schedule minimizes collection.

⁴The subsequently revised Judgment form (AO245, rev. 8/96) specifies payment “payable” immediately rather than the previous “payable” immediately - which, it was hoped, would allow full imposition at sentencing even in the Second Circuit. However, the subsequent case of Kinlock, *infra*, does not discuss this change.

⁵This provision states that, after ordering full restitution, the district court “shall specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid.”

F. Reference Documents on Restitution

Monograph 114: Criminal Monetary Penalties, Federal Corrections and Supervision Division, to be distributed upon approval by the Committee on Criminal Law, 2000. Practice and policy from start to finish of process, with amended and new forms, victim letters, and revised Judgment.

“Financial Investigations” *FJC Desk Reference*, available on J-Net, starting April 2000.

“Imposition and Enforcement of Restitution,” Goodwin, *Federal Probation*, June 2000.

“Determining Victims and Harms” *FJTN* broadcast, July 1999 (2 hours in length).

“Imposition of Restitution in Federal Criminal Cases,” (5 Steps in Determining Victims and Harms), Goodwin, *Federal Probation*, December 1998, pp. 95-108.

“When Do Various Provisions of the New Mandatory Restitution Act Apply?” Goodwin, *News & Views*, August 26, 1996.

“Looking at the Law,” Adair, *Federal Probation*, June, 1994, pp. 67-72 (discusses payment schedules, pp. 69-70).

“Recent Cases on Probation and Supervised Release,” Adair, *Federal Probation*, December 1992, pp. 68-72 (discusses aftermath of Hughey and issues raised by 1990 VWPA amendments).

“Recent Supreme Court Decisions,” Adair, *Federal Probation*, September 1990, pp. 66-71 (discusses implications of Supreme Court case of Hughey).

“Restitution - Ability to Pay,” Adair, *Federal Probation*, May 1989, pp. 85-88 (discusses defendant’s ability to pay, and whether restitution orders can be subsequently modified).

Some Related Articles:

“If you don’t have a dime, who pays for the crime? - The Mandatory Victims Restitution Act,” Tolvstad, D.O.J., *United States Attorneys’ Bulletin*, January 1999, pp. 11-19 (discusses both imposition and collection of restitution under the MVRA).

“Criminal Restitution : An Advantageous Option for Victims,” Levy, *Business Crimes Bulletin: Compliance and Litigation*, January 1999, pp. 2-4. (compares pros and cons of victims receiving criminal restitution vs. filing civil suits for damages).

